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IN THE

Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION AND INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. ESTABLISHING MALICIOUS PROSECUTION INELUCTABLY REQUIRES PROOF OF MALICE AND IS INDEPENDENT OF SEARCH AND SEIZURE. 5

II. THE FOURTH AMENDMENT SHOULD NOT BE A VEHICLE FOR LOWERING THE BAR ON MALICIOUS PROSECUTION CLAIMS. 11

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Albright v. Oliver,
510 U.S. 266 (1994) 4, 14, 15, 16

Franks v. *Delaware*,
438 U.S. 154 (1978) 12

Graham v *Connor*,
490 U.S. 386 (1989) 11

Monell v. *Dep't of Soc. Servs.*,
436 U.S. 658 (1978) 3

Paul v. *Davis*,
424 U.S. 693 (1976) 3

United States v. *Calderon*,
438 U.S. 160 (1954) 12

Whren v. *United States*,
517 U.S. 806 (1996) 11

Statutes

42 U.S.C. § 1983 ..... 2, 3, 16

Rules

Supreme Court Rule 37.6 1

TABLE OF AUTHORITIES (CONTINUED)

Other Authority

Charissa Eckhout, Note, *Section 1983 and the Tort of Malicious Prosecution: A Tenth Circuit Historical Analysis*, 82 Den. L. Rev. 499 (2005) 16

Jacques L. Schillaci, Note, *Unexamined Premises: Toward Doctrinal Purity in §1983 Malicious Prosecution Doctrine*, 97 Nw. U. L. Rev. 439 (2002) 6, 7, 8, 9, 10

Jody M. Offutt, *Expanding Attorney Liability to Third Party Adversaries for Negligence*, 107 W. Va. L. Rev. 553 (2005) 10

John T. Ryan, Jr., *Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?*, 64 Geo. Wash. L. Rev. 776 (1996) 6, 8, 10, 16

Laurie Edelstein, *An Accusation Easily to be Made? Rape and Malicious Prosecution in Eighteenth Century England*, 42 Am. J. Legal Hist. 351 (1998) 8

Lyle Kossis, Note, *Malicious Prosecution Claims in Section 1983 Lawsuits*, 99 Va. L. Rev. 1653 (2013) 15, 17

TABLE OF AUTHORITIES (CONTINUED)

Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218 (1979) 6, 7, 8, 9

INTRODUCTION AND INTEREST OF THE AMICUS CURIAE[1]

DRI–The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. Many of DRI's members regularly represent governmental entities in litigation under Section 1983. To pursue the interests of these members, DRI has a standing Government Liability Committee, whose primary focus is Section 1983 litigation.

DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense attorneys. As part of this mission, DRI pursues issues of import to the defense bar, seeking to address issues that are critical to defense attorneys and their clients, with an ultimate goal of improving the civil justice system. Thus, DRI participates as amicus curiae in cases raising issues of importance to its membership, such as this case, which threatens to increase governmental liability by expanding the Fourth Amendment beyond its text and meaning to fill a perceived gap in civil liability for government officials.

This case is of interest to DRI because it asks the Court to expand tort liability under the Fourth

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae DRI certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the amicus, its members, and its counsel made a monetary contribution intended to fund preparation or submission of this brief. Both counsel of record have consented to the filing of this brief.

Amendment in ways that will blur the amendment's meaning and unnecessarily extend the time frame of liability for state and local governments. The issue is whether a section 1983 claim premised on an alleged violation of the Fourth Amendment can subject police officers, and by extension their governmental employers, to liability for post-arrest actions that do not qualify as "searches" or "seizures." The issue arises in the context of a so-called Fourth Amendment malicious prosecution claim by which the petitioner claims he was unlawfully detained based on fabricated evidence. But the petitioner does not ask this Court to rule that claims for false arrest and false imprisonment are cognizable under the Fourth Amendment. Of course they are. Rather, the petitioner seeks a Fourth Amendment remedy for malicious prosecution—the act of asserting baseless criminal charges with malice.

There is no place in the Fourth Amendment for any claim that requires proof of malice as an element. Nor is there any place for a Fourth Amendment malicious prosecution theory to police the act of prosecuting someone. All parties—but particularly state and local governments that must train officers, anticipate liability, and set policy—benefit from a predictable set of constitutional rules that are guided by the text of particular amendments and the Court's precedents, rather than the unpredictability of using an elastic Fourth Amendment to create a new section 1983 claim based upon the common law of malicious prosecution. This case represents an attempt at drastic departure from the text of the Fourth Amendment and surrounding precedents in order to create a new constitutional

claim to remedy a purported injury that already has protections both in the Constitution and at common law. Because section 1983 authorizes money damages against government entities, *see Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978), expanding Fourth Amendment-based section 1983 claims to encompass malicious prosecution transforms both section 1983 and the Amendment into a "font of tort law"—something this Court has warned must not be allowed to occur. *Paul* v. *Davis*, 424 U.S. 693, 700-01 (1976). And if the petitioner is successful, the precedent will discourage officers, and the departments who train them, from applying the full extent of their authority to protect law-abiding citizens.

In sum, DRI and its members seek to promote adherence to fundamental principles of constitutional and statutory interpretation, in order to prevent the Bill of Rights from being treated as an ethereal common law doctrine that may be bent to the will of a moment to right every perceived wrong.

SUMMARY OF ARGUMENT

Petitioner seeks to stretch the Fourth Amendment's reach beyond its text and history as a solution in search of a problem. Illinois recognizes a common law malicious prosecution claim, and Elijah Manuel does not explain why that claim is unsatisfactory as a general matter. Rather, he asks this Court to take a common law claim and create a cause of action for it under the Fourth Amendment without statutory or constitutional imprimatur.

The evolution of malicious prosecution as a tort demonstrates why it cannot be shoehorned it into the

Fourth Amendment. Malicious prosecution is over a thousand years old and is rooted in the Anglo-Saxon punishment of cutting out one's tongue for a false accusation of criminal activity Over time, the punishments changed, and the claim was distilled into a four-part test focused on (1) improper institution of criminal proceedings, and (2) malice.

The Fourth Amendment is a poor vehicle for punishing malice or policing prosecution. The Court has been consistent and clear that the Fourth Amendment's proscription of "unreasonable searches and seizures" states an objective standard, and officers' subjective intentions are irrelevant to any claim under the Fourth Amendment. Importing a malicious prosecution claim requiring proof of subjective intent would require carving out an exception to that rule after decades of strict adherence.

Moreover, the petitioner here attempts to blur the distinction between false imprisonment and malicious prosecution by trying to import malicious prosecution into the Fourth Amendment. The elements of malicious prosecution do not include any aspect of a search or a seizure. They are irrelevant. In the common law, an action for malicious prosecution will lie regardless of whether the criminal defendant was seized. But the petitioner asks the Court to modify it to be a duplicative claim for false imprisonment with a longer statute of limitations. This Court did not endorse such an end-run around proper pleading in *Albright v. Oliver*, 510 U.S. 266 (1994), and it should not start down the path of resolving any concerns over the statute of limitations for false imprisonment by expanding the

Fourth Amendment to include a malicious prosecution claim that does not belong.

The results of such an expansion would be severely damaging to states and municipalities. They would have little or no way to anticipate the scope of liability for police officers in light of the blurring of the heretofore clear requirement that search and seizure claims be based on objective analysis of the facts before the officers. It will create a further incentive for law enforcement departments to train police to avoid using the full extent of their authority, knowing that a prosecution that is out of their hands can lead to liability based on the evidence of an officer's subjective intent that is pieced together years later.

The judgment below should be affirmed.

ARGUMENT

I. ESTABLISHING MALICIOUS PROSECUTION INELUCTABLY REQUIRES PROOF OF MALICE AND IS INDEPENDENT OF SEARCH AND SEIZURE.

Malicious prosecution, by its very name, asserts an *abuse of process* with *malice*. Its history and development over the past millennium has focused on refining those two factors, while balancing the interests of the accused, the victim, and law enforcement.

Exacting penalties for malicious prosecution began over a thousand years ago. "Anglo-Saxon courts have been concerned with malicious prosecution since at least the tenth and eleventh centuries, when the price of losing a civil lawsuit was

the forfeiture of one's tongue." John T. Ryan, Jr., *Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?*, 64 Geo. Wash. L. Rev. 776, 778 (1996). Judges found wrongful prosecutions to be abhorrent, and an "'aggravated form of defamation.'" Jacques L. Schillaci, Note, *Unexamined Premises: Toward Doctrinal Purity in §1983 Malicious Prosecution Doctrine*, 97 Nw. U. L. Rev. 439, 443 (2002) (citation omitted). So any failed prosecution was considered an abuse of process. And regardless of any detention, pre-trial punishment, or otherwise, instigating the prosecution itself was the offense.

Unfortunately, "[a] central problem of these early regimes is that they did not distinguish between the honest, well-meaning false accuser and she who brought a false charge to defame the accused." *Id.* The system was designed without the possibility of recognizing the existence of the honestly mistaken accuser, because of the system's purportedly divine sanction. Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218, 1222 (1979).

From these beginnings, the nature of a claim of malicious prosecution changed over time. Schillaci, 97 Nw. U. L. Rev. at 443. Changes to the punishment preceded changes to the procedure. First, the punishment evolved to require an unsuccessful accuser to pay a fine or face imprisonment—somewhat less Draconian than losing one's tongue. *Id.* at 443-44. Then, "amercement" arose as a refinement to the system of punishment, linking the fine to the harm done to the party accused in the malicious prosecution. Note, *Groundless Litigation*, 88 Yale L.J. at 1222.

Liability for malicious prosecution remained tied in as part of the original proceeding, and almost all unsuccessful accusers still were found to have committed malicious prosecution. *Id.* But that system tied the fine to the harm done to the accused party. *Id.* Still, the amercement system did not compensate wronged defendants. *Id.*

Next, the English introduced a further procedural element to protect the well-meaning false accuser. Schillaci, 97 Nw. U. L. Rev. at 444. They legislated a "good cause" requirement, which established that the accused could not recover from the accuser if the accused was indicted. *Id.* This may have overshot the mark, as findings of malicious prosecution dropped, though primarily because wealthy people began paying proxies—straw-parties—to assert their accusations. *Id.*

To combat this trend, a system based on a writ of conspiracy that operated in straw-party actions brought by proxy parties to ensure that amercement penalties could be levied against the accuser as well as his straw party bringing the suit. Note, *Groundless Litigation*, 88 Yale L.J. at 1224. Conspiracy only operated in cases involving straw-party actions, but significantly, it introduced compensation to victims of groundless prosecutions and the requirement of malice. *Id.* at 1224-25.

Over time, resistance to a plain tort of malicious prosecution faded. *Id.* at 1226-27 Parliament passed laws to create and broaden rights to taxation of costs against unsuccessful accusers. *Id.* Still, there was no remedy by which a wrongly accused person could recover damages for the injuries he or she suffered as a result of a wrongful prosecution. *Id.* This persisted almost to the end of the

Seventeenth Century. *Id.* at 1228.

In 1698, Lord Holt adopted a common law method for obtaining special damages that "established the guidelines that have become the modern English Rule" of common law malicious prosecution claims. *Id.* at 1228-29. Judges had been reticent to adopt a broad-reach malicious prosecution claim because of the deterrent effect on victims of crimes. Schillaci, 97 Nw. U. L. Rev. at 443. In light of this concern, establishing a claim for malicious prosecution has subsequently required clearing a high bar. Laurie Edelstein, *An Accusation Easily to be Made? Rape and Malicious Prosecution in Eighteenth Century England*, 42 Am. J. Legal Hist. 351, 358 (1998) ("Because of the procedural obstacles to maintaining an action for malicious prosecution, few victims of malicious proceedings brought such a claim.")

As malicious prosecution law developed in Eighteenth Century England, judges identified "three principal motives in bringing a malicious accusation: revenge, forestalling legitimate prosecutions, and monetary gain." Edelstein, 42 Am. J. Legal Hist. at 358. This led to malicious prosecutions generally falling into three categories: (1) people of middle rank suing each other pursing personal or commercial disputes, (2) prosecutions by masters against servants to avoid payments owed, and (3) prosecutions by poor people "against their social superiors." *Id.* at 358-59.

This greater understanding of the motivation for malicious prosecution set the path toward modern malicious prosecution doctrine. The modern view acknowledges that the availability of recovery for malicious prosecution deters groundless suits. Ryan,

64 Geo. Wash. L. Rev. at 779. But a malicious prosecution claim with low standards of proof —that, for example, does not require proof of malice—would significantly deter litigation by accusers who cannot afford a subsequent malicious prosecution suit if he or she is unsuccessful. *Id.* ("Those in support of the more stringent 'English Rule' speak of the need to protect honest litigants from reprisal and to resolve litigation fairly and expediently"). Thus, modern malicious prosecution theory must balance four competing policy interests—encouraging honest accusers, resolving litigation quickly and finally, deterring groundless suits, and compensating victims of groundless suits. Note, *Groundless Litigation*, 88 Yale L.J. at 1220.

After the Revolutionary War, several states adopted the now-evolved version of English common law malicious prosecution, Schillaci, 97 Nw. U. L. Rev at 445, while the parallel structure of charging costs—still extant in England—faded away in the new Republic, Note, *Groundless litigation*, 88 Yale L.J. at 1229. The claim has four elements: (1) institution of a criminal proceeding by the defendant, (2) termination of the proceeding in the plaintiff's favor, (3) a lack of probable cause to support the charges, and (4) malice. Schillaci, 97 Nw. U. L. Rev. at 445. Liability turns on the existence of the criminal proceeding itself, not on whether the defendant's freedom was restrained during the process. There is no search or seizure requirement. And as the punishment has evolved and the elements have evolved, the only thing that separates liability now from the problematic original formulation that "did not distinguish between the honest, well-meaning false accuser and she who brought a false charge to defame the accused," *id.* at

443, is the requirement of proving the defendant's subjective state of mind—his or her intent to initiate a prosecution for reasons other than bringing a criminal offender to justice.

Thus, proving malice-in-fact—meaning that the defendant's primary purpose in bringing the prior action was not bringing the offender to justice—is a critical component of malicious prosecution claims. Ryan, 64 Geo. Wash. L. Rev. at 779. The plaintiff must establish something more than simply a lack of probable cause, and some jurisdictions go further and require the plaintiff to prove special damages. *Id.*

The American system places great weight on the interest in encouraging honest victims to bring their accusations into the legal system so that it can determine guilt or innocence through investigation, indictment, and trial. Jody M. Offutt, *Expanding Attorney Liability to Third Party Adversaries for Negligence*, 107 W Va. L. Rev. 553, 560-61 (2005) ("Public policy requires that people be able to freely resort to courts for redress of a wrong and the law should protect them when they commence a civil suit or criminal action in good faith and on reasonable grounds."). And for one who *abuses the process* by *maliciously* duping the parties to the system, the tort of malicious prosecution exists in the common law. Its millennium-long evolution places its proper balance at allowing recovery only when the accuser—be it a police officer or a private citizen—is proven to have harbored ill will, and only for the actual abuse of the process, leaving issues ancillary to abuse of the criminal process to other claims.

II. THE FOURTH AMENDMENT SHOULD NOT BE A VEHICLE FOR LOWERING THE BAR ON MALICIOUS PROSECUTION CLAIMS.

Malicious prosecution claims now, finally, strike the right balance among the competing interests in unsuccessful criminal litigation. Yet Petitioner asks this Court to stretch the Fourth Amendment beyond recognition to encompass a form of malicious prosecution that is essentially a duplicative claim for false imprisonment with a longer statute of limitations. The impropriety of expanding the Fourth Amendment to encompass malicious prosecution claims is evident in each of the two words that describe the claim: this Court's precedents leave no place for malice to become an element of a Fourth Amendment claim, nor does the Fourth Amendment even purport—under its plain language or this Court's precedents—to police a decision to prosecute and continue prosecution.

Given the malice requirement, malicious prosecution claims are particularly unsuitable for treatment under the Fourth Amendment. The Fourth Amendment protects people from "unreasonable searches and seizures." Because a search or seizure must be "unreasonable" to support a Fourth Amendment claim, Fourth Amendment analysis must focus on objective factors, rather than subjective intent. *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) ("Whatever the empirical correlations between 'malicious and sadistic' behavior and objective unreasonableness may be, the fact remains that the

'malicious and sadistic' factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment").

The United States as amicus curiae admirably attempts to cabin the danger here by suggesting that the Court should import something akin to a malice requirement of the elements of state common law claims for malicious prosecution from *Franks* v. *Delaware*, 438 U.S. 154 (1978). Br. of Amicus Curiae United States of America at 23-29. But that solution, untethered to the text or history of the Fourth Amendment, presents its own danger. It attempts to stretch a precedent based on the "oath or affirmation" requirement of the warrant clause, *Franks*, 438 U.S. at 172—which carries a "good faith" requirement, *United States* v *Calderon*, 438 U.S. 160, 164 (1954), over to the search and seizure clause, which has no such requirement. The United States offers no limiting principle that would prevent a departure from the Fourth Amendment's text not only in the malicious prosecution context, but in other contexts. Br. of United States at 25. There is no such limiting principle.

To make the position seem more reasonable, the United States asserts that a plaintiff has a constitutional right to be free of wrongful pretrial detention. Br. of the United States at 11. But when the United States asserts that "what is actionable under the Fourth Amendment is not the decision to pursue criminal charges, but only petitioner's detention absent a valid probable cause determination," it moves the ball on the question presented. The petitioner here does not ask this

Court to determine whether false arrest or unlawful detention is cognizable under the Fourth Amendment. The question presented is whether the Constitution "allow(s) a malicious prosecution claim based upon the Fourth Amendment." Br. of Pet. i. And a claim for malicious prosecution has nothing to do with whether a person was subject to pretrial detention.

The irrelevance of search and seizure to liability for malicious prosecution is evident in the second word of the tort: prosecution. Neither a search nor a seizure is an element of the common law malicious prosecution tort. Rather, the tort of malicious prosecution arises from initiation and pursuit of a criminal proceeding without probable cause.

To the extent Petitioner claims his injury is pretrial detention, that is simply not a malicious prosecution claim. And Petitioner has not asked the Court to determine whether there is a false arrest or false imprisonment claim under the Fourth Amendment. The petitioner apparently is unable to raise those claims based on the applicable statutes of limitations. Br. of Pet. at 9. But the fact that Petitioner was unfortunately unable to raise his claims in a timely manner, regardless of the reason, is no justification for this Court to render the Fourth Amendment so malleable as to embrace a claim that requires malice and has nothing to do with whether there was a search or a seizure. Nor is it justification for the Court to turn malicious prosecution into an amorphous claim that is coextensive with false imprisonment but conveniently has a longer statute of limitations.

The Court has not held otherwise. Contrary to Petitioner's assertion, Br. of Pet. at 8, the Plurality

did not hold the Fourth Amendment is applicable to malicious prosecution claims in *Albright*. In *Albright*, the petitioner asserted that he could raise section 1983 claims against prosecution-without-probable-cause as a substantive due process right. 510 U.S. at 268. The Court disagreed. The plurality initially noted the Court's reluctance to expand substantive due process. *Id.* at 271. It the ruled that "substantive due process, with its 'scarce and open-ended' 'guideposts,' can afford him no relief." *Id.* at 275 (citation omitted).

While discussing the petitioner's claim, the plurality noted that the Fourth Amendment is proper to address "pretrial deprivations of liberty." *Id.* at 274. The plurality suggested that the petitioner's claim was really more of a false arrest or false imprisonment claim as a Fourth Amendment matter, insofar as the petitioner sought compensation for not only being charged, but having "submitted himself to arrest." *Id.*

The plurality further noted there is no constitutional protection against the decision to prosecute—a central question in a malicious prosecution claim. *Id.* Ultimately, the question of whether a malicious prosecution claim is cognizable under the Fourth Amendment was not resolved.

In concurrence, Justice Scalia noted that the process "due" with respect to pre-trial deprivations of liberty likely are concomitant with the protections for the act of seizing someone under the Fourth Amendment. *Id.* at 275. But Justice Scalia further noted that it was unnecessary for the Court to resolve whether a malicious prosecution claim might exist under the Due Process clause as a procedural matter because the petitioner had not invoked the

right to "procedural" due process. *Id.* Moreover, Justice Scalia pointed to the Fifth and Sixth Amendments, not a Fourth Amendment expanded to encompass malicious prosecution, as the source of "procedural guarantees relating to the period before and during trial." *Id.* Similarly, Justice Kennedy wrote in concurrence, joined by Justice Thomas, that "Albright's due process claim concerns not his arrest but instead the malicious initiation of a baseless criminal prosecution against him." *Id.* at 281. Justice Souter, too, focused on the fact that petitioner's "malicious prosecution" claim actually only asserted injuries associated with being taken into custody, rather than the prosecution itself. *Id.* at 289. And in dissent, Justice Stevens, joined by Justice Blackmun, stated that the petitioner had a viable Fifth Amendment claim based on "a requirement that criminal prosecution be predicated, at a minimum, on a finding of probable cause." *Id.* at 296.

So while many assert that "[t]he central holding in *Albright* was that the Fourth Amendment was a natural home for the tort of malicious prosecution," Lyle Kossis, Note, *Malicious Prosecution Claims in Section 1983 Lawsuits*, 99 Va. L. Rev. 1653, 1655 (2013), that ultimately is not correct. The plurality's holding was only that that plaintiff had not stated a substantive due process claim. *Albright*, 510 U.S. at 275. And between the plurality and concurrences, a majority of the Court stated that a claim based on the prosecution itself does not arise under the Fourth Amendment, but rather, that the Fourth Amendment protects against any concomitant seizure.

If a malicious prosecution claim may fit under any provision of the constitution, it is the Due Process clause. Ryan, 64 Geo. Wash. L. Rev. at 809. "The essence of a malicious prosecution claim for deprivation of due process under § 1983 is that an official, acting under color of state law, initiated a prosecution against an innocent individual, without probable cause, and with malice." *Id.* at 812. And any such claim would come with the limitations inherent to the Due Process clause. *Albright*, 510 U.S. at 276 (Scalia, J., concurring).

Nor should the Court take the drastic step of creating a Fourth Amendment malicious prosecution claim to fill a perceived gap in constitutional coverage. Shoehorning malicious prosecution claims into the Fourth Amendment will not provide any significant advantage over state law claims for malicious prosecution. "Damage awards available for common law malicious prosecution actions have been historically equivalent to that of the § 1983 alternative" in circuits in which the courts have created a malicious prosecution remedy under the Fourth Amendment. Charissa Eckhout, Note, *Section 1983 and the Tort of Malicious Prosecution: A Tenth Circuit Historical Analysis*, 82 Den. L. Rev. 499, 515 (2005). And in light of the similar pleading and proof standards between federal and state courts, the only significant difference between a federal and state cause of action for malicious prosecution is the potential availability of attorney's fees in federal court. *Id.*

The disadvantages of this tack would be great. Police departments will be reticent to do anything that could expand their tort liability. And given the possibility of liability for an act outside of their

control—the choice to prosecute—on an issue that will hinge on an officer's subjective state of mind as adjudged years later, they will be forced to train officers to at least hesitate before using their full authority. Placing such handcuffs on police officers as they face life and death situations on a daily basis only serves to risk their safety, and the safety of the citizens they are working to protect.

"The line between constitutional and non-constitutional violations has become increasingly blurred, as more and more litigants are attempting to frame their injuries from official conduct as constitutional violations." Kossis, 99 Va. L. Rev. at 1655. But not every injury is a constitutional violation, nor should it be. Nor is the Fourth Amendment a vehicle for adopting and modifying common law torts. "Petitioner's claim for damages here targets only his pretrial detention." Br. of United States at 21. That is not malicious prosecution, and the petitioner could not or did not timely present a claim for false imprisonment. This case presents a significant risk of further blurring the boundaries of constitutional protections. To avoid rendering the Bill of Rights into an ethereal outline of federal common law, the Court should reject the effort here to impose the Constitution as a remedy for every harm.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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